

**TCI Cablevision of Montana, Inc. d/b/a AT&T
Broadband and International Brotherhood of
Electrical Workers, Local 44, AFL-CIO. Case
19-CA-26874**

August 24, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND
WALSH

On February 28, 2001, Administrative Law Judge William L. Schmidt issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions and to adopt the recommended Order as modified below.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, TCI Cablevision of Montana, Inc., d/b/a AT&T Broadband, Missoula, Montana, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.²

1. Substitute the following for paragraph 2(c).

"(c) Within 14 days from the date of this Order, remove from its files any reference to Benny Murphy's suspension and discharge in February 2000, and notify Murphy within 3 days in writing that this has been done and that this suspension and discharge will not be used against him in any way."

2. Add the following as paragraph 2(d) and reletter the subsequent paragraphs.

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We agree with the judge's finding that Murphy's "marked man" expression was not a threat of death or bodily harm. The record does not indicate that the Respondent had any reason to believe that Murphy, a longtime employee, would have engaged in violent behavior.

² We shall modify the judge's recommended Order in accordance with our recent decision in *Ferguson Electric Co.*, 335 NLRB 142 (2001).

We shall also modify the judge's recommended Order in accordance with our decisions in *Indian Hills Care Center*, 321 NLRB 144 (1996), and *Excel Container*, 325 NLRB 17 (1997).

"(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order."

3. Substitute the following for the relettered paragraph 2(e).

"(e) Within 14 days after service by the Region, post at its Missoula, Montana facility copies of the attached notice marked 'Appendix.'¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 9, 2000."

4. Substitute the attached notice for that of the administrative law judge.

APPENDIX

**NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government**

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT suspend or discharge any of you because you engage in activities protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Benny Murphy full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he previously enjoyed and WE WILL make him whole with interest for any loss of earnings and other benefits resulting from his suspension and discharge in February 2000.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to Benny Murphy's suspension and discharge in February 2000, and WE WILL, within 3 days, notify him in writing that this has been done and that this suspension and discharge will not be used against him in any way.

TCI CABLEVISION OF MONTANA, INC.,
D/B/A AT&T BROADBAND

Patrick Dunham, Esq., for the General Counsel.
Robert A. Blackstone and Robert F. Porcarelli, Esqs. (Davis, Wright & Tremaine LLP), for the Respondent.
Neil Tyree, for the Charging Party.

DECISION

STATEMENT OF THE CASE

WILLIAM L. SCHMIDT, Administrative Law Judge. On February 28, 2000,¹ Local 44, International Brotherhood of Electrical Workers, AFL-CIO (Local 44, Union, or Charging Party) filed a charge alleging that TCI Cablevision of Montana, Inc., d/b/a AT&T Cable Services (Respondent or Company) violated Section 8(a)(1) of the National Labor Relations Act by terminating Benny Murphy for "Union activity." On May 12, the Acting Regional Director for Region 19 issued a complaint and notice of hearing alleging that Respondent violated Section 8(a)(1) of the Act by suspending Murphy on February 9 and by terminating him on February 16 because Murphy "engaged in protected concerted activities, including, but not limited to, outside working hours, telephoning employees at their residences regarding strike and decertification activities, and/or to discourage employees from engaging in these activities." Respondent filed a timely answer denying that it engaged in the unfair labor practices alleged.

I heard this case at Fire Station No. 4 in Missoula, Montana, on October 24. Having now carefully considered the transcript and exhibits, the demeanor and credibility of the witnesses, and the posthearing briefs of the General Counsel and Respondent, I find Respondent violated the Act as alleged based on the following

¹ Dates refer to the 2000 calendar year unless shown otherwise.

FINDINGS OF FACT

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent, a Montana corporation, maintains an office and place of business in Missoula, Montana, where it is engaged in the business of providing cable television and other related services. In the 12-month period preceding the issuance of the complaint, Respondent's gross sales of goods and services exceeded \$500,000. In the same period, Respondent purchased and caused to be transferred and delivered to its Montana facilities goods and materials valued in excess of \$50,000 directly from sources outside Montana, or from suppliers within Montana which in turn obtained such goods and materials from sources outside the State of Montana. Based on the foregoing, I find that Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Based on Respondent's admission, I further find that Local 44 is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

Respondent provides cable television services throughout the greater Missoula area. Douglas Johnson, Respondent's general manager at Missoula, oversees the operations there. About 46 employees work at Missoula. Local 44 represents approximately 16 of these employees who work as installers and construction employees. Nathan Brewster, Respondent's technical operations manager, directly supervises the unit employees.

By the time of his February 16 termination, Benny Murphy had worked for Respondent or its predecessors at Missoula for over 20 years. General Manager Johnson described Murphy as a "highly respected and highly trusted" employee and he professed to have a "high degree of respect for [him] as far as his professional duties were concerned." For the last 12 years Murphy served as Local 44's shop steward. In this capacity he attended the collective-bargaining negotiations and served as the Union's first-line grievance processor.

Murphy obviously pursued his union duties with considerable energy and skill. While negotiations for the predecessor to the last collective-bargaining agreement were underway, Jody Yelton, then one of the Missoula employees, filed a decertification petition that eventually led to a representation election. During that election campaign, the Company's chief executive officer argued against further representation while Murphy argued the Union's case for representation. The election resulted in overwhelming support for Local 44. Murphy asserted without contradiction that Yelton subsequently received a promotion to a higher position in Idaho but later lost that job when the Company "downsized" that operation.

Closer to the time of his termination, management had become quite displeased with Murphy's union activity. Thus, at a staff meeting in late 1998 or early 1999, Johnson openly denigrated Murphy's work as steward to the other employees. The occasion arose after several unit employees submitted a signed protest letter to Johnson complaining about a new requirement that they train outside contractor employees on the use of heavy equipment. During that meeting, Johnson accused Murphy of

instigating the letter, charged that Murphy “was not a good shop steward,” and expressed his desire to “have somebody else in there” because Murphy “was . . . not . . . a good representative of the union.”²

B. The February 8 Events

By the beginning of February 2000, Respondent and Local 44 were engaged in another round of contract negotiations as the existing agreement was scheduled to expire around February 7. A tense atmosphere shrouded the bargaining sessions held on February 7 and 8 because they involved discussions about benefits the Union had sought for several years. By that time, management officials had transferred workers to Missoula from other locations in the event a strike interrupted regular operations.

At the conclusion of the February 8 negotiating session, Murphy returned to the Company’s facility where he learned of rumors that some employees, disturbed by the prospect of a strike, had begun another decertification effort. Murphy’s pursuit of this dissension led to Jim Hudson, a unit employee who still belonged to Local 44. Murphy telephoned Hudson around dinnertime that evening. Admittedly, Murphy and Hudson exchanged heated words during the course of their 15-minute telephone conversation about the nascent decertification movement and its adverse impact on the negotiations then underway. According to Murphy, Hudson sounded “primed” for his call. That assessment sounds consistent with the frame of mind seemingly displayed by Hudson when he called General Manager Johnson a short time earlier that day for the telephone number of the NLRB’s Seattle office in order to obtain information about union decertification procedures. In their conversation Hudson told Johnson that “Benny was way out in left field and they were tired of it” and that he along with two or three other technicians with him “were sick and tired of having a shop steward who didn’t keep them informed about what was going on.”

Hudson insists that Murphy told him during their telephone conversation: “You’re a marked man and marked men go away.” Even though Hudson did not fear any direct harm from Murphy personally, he still considered the “marked man” label to be a threat. Because of Murphy’s wide influence, Hudson thought that Murphy could easily “arrange” for other Local 44 members, such as the Montana Power Company’s linemen often on the same construction projects where he worked, to drop “a live wire on me, I guess.” As a matter of fact, one of these crewmen called Hudson “a rat” a little more than a week later.

Murphy admits using “marked man” phrase but he specifically denied that he used the words attributed to him by Hudson. Murphy insists his actual remark was: “You’re making himself a marked man and marked men don’t go away.” Murphy claims that he intended only to convey the notion that employees who “started the decerts” at such critical times in negotiations “were remembered.” Preceding the remark, Hudson told Murphy that the Company’s office manager had warned

Hudson that afternoon that if he “walked out the door he would never walk in it again” because he would be replaced by one of the new workers already at the Missoula site. Hudson further told Murphy that he had called General Manager Johnson after that to assure Johnson that he would be the first to cross a picket line if a strike occurred. Hudson then asserted to Murphy that about seven employees in Missoula and five in Butte favored decertification. Murphy disputed Hudson’s numbers and warned him that his decertification talk:

[S]hows fragmentation . . . on our side of the table. . . . [Y]ou’re being used as a puppet by the company right now. You know, they’re going to use you. . . . They are going to use you like they used. . . . [Yoeder] . . . in years prior [Y]ou’re going to be walking the streets like he is. I said, you’re making yourself a marked man. These guys are remembered for what they did.

Following the “marked man” remark, Hudson repeatedly accused Murphy of threatening him. Murphy repeatedly denied Hudson’s threat allegation. Finally, after Hudson continued to charge Murphy with making a threat, Murphy told Hudson: “[W]ell if you’re taking it as a threat . . . that’s up to you.” This comment inspired Hudson to demand that Murphy repeat this remark because “he had somebody on the other line.” A short time later Hudson hung up.

After the Murphy call, Hudson telephoned employees Jim Wingfield and Doug Lindon as well as Katy McKinnon, the Company’s customer sales and service manager who oversees much of Respondent’s office operations. To all he charged that Murphy had threatened him. McKinnon suggested that Hudson report the incident to General Manager Johnson. After considerable effort, Hudson located Johnson and reported the perceived threat by Murphy. Johnson asked Hudson to prepare a written statement describing the events that occurred and advised Hudson to report the incident to the police. Hudson claims that he later spoke with a “deputy” by telephone that evening but apart from his sparse testimony no evidence shows that any police involvement ever resulted or was subsequently sought.

C. The Company’s Investigation and Murphy’s Discharge

Following his conversation with Hudson, Johnson reported the incident to Regional Vice President Randy Bang. Bang, it seems, turned the investigation details over to Pat Batten, Respondent’s regional human resources director. Later that evening, Batten provided Johnson with the detailed directions to follow in conducting an investigation the following day.

Early the next day Johnson interviewed Hudson, Murphy, Wingfield, and Lindon about Hudson’s allegation. Technical Operations Manager Brewster took notes during all of the interviews. Hudson, Lindon, and Wingfield provided Johnson with written statements.³ Johnson held two brief meetings with

² I base these findings on Murphy’s credible, uncontradicted testimony.

³ Throughout, Respondent put Wingfield and Lindon forth to show that Hudson made a contemporaneous report that Murphy had threatened him and that he sounded frightened. Brewster’s notes show that Wingfield who appears to have supported Hudson’s decertification notion told Johnson that he felt like a marked man also even though

Murphy before the latter requested the presence of a Local 44 business agent rather than simply another employee to serve as a witness. At the end of their second meeting, Johnson suspended Murphy with pay pending the conclusion of the investigation. He also warned Murphy against contacting Hudson. Brewster then escorted Murphy from the Company's premises.

Later that afternoon, Murphy returned with Local 44 Agent Stan Dupree for an extended discussion with Johnson (with Brewster again taking notes) about Hudson's allegation. Dupree argued that Murphy's suspension was extreme, sending the wrong message at that critical time, and that the entire matter was only an ordinary tiff between two employees. For his part, Murphy denied that he threatened Hudson, denied that he told Hudson, "[Y]ou'r a marked man and marked men go away," stated he would never threaten Hudson and labeled Hudson's interpretation of his remarks as "wrong." Johnson advised Dupree and Murphy that the final decision would be made at the Company's headquarters.⁴

Meanwhile, at the regional headquarters in Denver Jerome Kashinski, Respondent's senior operations counsel, learned about the Murphy-Hudson controversy from Bang and Batten, seemingly by chance. Kashinski immediately perceived Murphy's "marked man" remark to be a death threat. "A marked man," Kashinski explained, "is somebody who has been singled out or nominated for either severe harm or death. . . . [I]t's like a Mafia hit. Contract taken out, someone is a marked man." Even though he felt Company officials then involved, namely, Bang, Batten and Johnson viewed the matter seriously, he did not believe that they took it "as seriously as [he] thought it should have been taken."

Consequently, Kashinski began rounding "up all the [C]ompany resources . . . to deal with a threat like that." He directed that Johnson arrange . . . to move Hudson and his wife out of their home to a hotel and to obtain a private security guard to look out for them and the "the company's interests."⁵ Hudson went along with these arrangements even though he thought "it was little much" because he "could relate that the company had to take every precaution feasible to them in case something did happen to me and my family." Regardless, the Hudsons returned to their home later that day. Hudson's assigned security ended after three days at his request because his family felt "uncomfortable" having the guards around.

On February 10 Scott Hiigel, Respondent's central division president with managerial responsibility for the Montana operation, directed that Kashinski and Batten go to Missoula to conduct another investigation.⁶ When they arrived in Missoula on

there is no showing that any such remark was ever made to him by Murphy.

⁴ The findings in this paragraph come largely from Brewster's notes.

⁵ Because the Company thought the Union might commence an economic strike at around the same time, it already retained security services for its premises and equipment. It appears that the security assigned to Hudson came from this contingent.

⁶ Kashinski explained his subsequent close involvement in this manner:

I had worked with Mr. Hiigel virtually the entire time I had been with the company, except he was in Japan for three years running operations there. And he had come to trust and rely upon

February 11, they began by reviewing the statements Johnson had obtained. Thereafter they interviewed Wingfield and London, and then arranged to interview Murphy at his lawyer's office.

Murphy purportedly told Kashinski and Batten that his actual statement to Hudson had been "You're a marked man and *marked men don't go away*." When asked by Kashinski to explain the meaning of that remark, Murphy said that he only intended to convey the notion that Hudson "was going to be remembered as someone who had hurt the union by bringing up the subject of decertification in the midst . . . of negotiations" and that Hudson would be "remembered as somebody disloyal to the union." Kashinski discredited Murphy's explanation. He explained his reason for doing so in this manner:

Because it had been already reported to me by Mr. Johnson that—how he had attempted—how Mr. Murphy had attempted in two prior conversations to explain the events and the words of the evening. You know, I was told first he said, you know, Oh, no, I didn't say anything at all like that. Then he said, Well, no, I didn't say that at all. And now here is a third version. I found him, frankly, you know—having interviewed lots of people, having a couple small children—scrambling to come up with a new set of facts to explain something that he now realized was very serious and could have very serious consequences for him. He simply was not credible. That explanation was not credible to me.

Following the Murphy interview, Kashinski and Batten then spoke with Hudson and his wife. Kashinski recalled that Hudson had told him:

He had said that Mr. Murphy, you know, accused him of being disloyal, of—you know, that there could not be a worse time than right after this contract had expired and the union was attempting to negotiate a new contract, that he should show disloyalty by asking about how do you decertify. You know, as Mr. Murphy had said to me during my interview with him, you know, it really disrupted the unity on their—Mr. Murphy being the union's side of the table, which is absolutely true. I mean, it showed a real lack of solidarity.

And Mr. Murphy, quite rightfully, has been described to me as someone very passionate about union representation and he was really angry about that. And that's what Mr. Hudson told me. I mean, he was really, really mad that Jim Hudson had done this. And, you know, had made this threat to him. And

me. And where significant situations, not just threats or things like that, arose, he would often dispatch me to go be his eyes and ears, figure out what happened and report back. And we found in all sorts of things there are biases, both good and bad, in local managers. And he wanted me to go along with Mr. Batten, be an independent set of eyes and ears to see what had gone on.

And additionally, frankly, we figured, depending upon one of several possible outcomes, if an outcome was termination of employment of Mr. Murphy, that given that it was a workplace with a union contract that a U[L]P might be filed and the company might end up in a hearing room like this, and he wanted to make sure that we had done an extremely thorough investigation.

that Mr. Hudson said, you know, he wanted his wife to hear this and as soon as he was done, he started calling people.

On Monday February 14, Kashinski confirmed that the Company had uniformly discharged other employees for making “serious threats of violence.” He then recommended that the Company discharge Murphy because he concluded that Murphy had told Hudson that “[y]ou’re a marked man and marked men go away” which Kashinski interpreted as “somebody singled out, nominated, designated for serious physical harm or death [a]nd marked men go away means that threat will be carried out.” Kashinski explained the basis for his conclusion about the meaning of the “marked man” phrase this way:

Q. BY MR. DUNHAM: In response to counsel’s question earlier in your testimony about why the phrase, “You are a marked man and marked men go away,” why that phrase was threatening, you responded, A marked man is someone who has been singled out and it is like a Mafia hit. What did you mean by that?

A. Well, by way of background, I grew up in Chicago.

Q. Uh-huh.

A. My father, although not to my knowledge a member of any sort of organized crime activity, had manufacturing plants where there were people who certainly appeared to him and to me to be engaged in what we would politically incorrectly call Mafia-related activities. I grew up with people like Tony Acardo (phonetic) and the Chicago Mobsters being reported on quite consistently in the newspaper and radio coverage. And they would talk about Mafia hits and contracts and people being marked for death. So it is a phrase I am familiar with from my upbringing.

Q. Okay. And that upbringing, your familiarity with the phrase in the Chicago context is at least in part what caused you to conclude that Mr. Murphy’s words were a threat?

A. I don’t think it had to be in the Chicago context. I think anywhere those words are a threat.

The Company adopted Kashinski’s recommendation. On February 16, Johnson met with Murphy at his lawyer’s office and terminated him.

About 3 weeks later, a Milltown employee transferred to Missoula to work in the event of a strike accosted employee Pat O’Connor following a staff meeting, belligerently accused O’Connor of making an obscene gesture toward him while both were off duty, and challenged O’Connor “to settle it outside.” O’Connor reported the incident to Johnson but he declined to do anything because “it was my word against his, his word against mine, and there was nothing he could do about it.”

D. Further Findings and Conclusions

Respondent argues that it conducted “two thorough investigations” and concluded that Hudson reasonably interpreted Murphy’s marked man remark “as a threat of death or serious bodily harm.” Having reached this conclusion, Respondent avers that it discharged Murphy for misconduct in accord with its lack of tolerance for “these kinds of threats in its workforce.”

The General Counsel disputes Respondent’s claim that Murphy’s “marked man” reference amounts to any kind of threat, physical or otherwise. Murphy used the remark, the General Counsel argues, as a means of describing Respondent’s conduct toward other employees who stepped forward to lead decertification movements. In effect, General Counsel asserts that Murphy attempted to convince Hudson to expect the same treatment as the leader of the prior decertification movement, i.e., promoted, transferred, and then dumped in a downsizing move. Viewed in this manner, the marked man remark obviously amounts to protected rhetoric.

An employer violates Section 8(a)(1) of the Act by discharging an employee based on its good faith but mistaken belief that the employee engaged in misconduct in the course of activity protected by Section 7 of the Act. *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21 (1964).⁷ No specific showing of a prohibited motive is required to find such a discharge unlawful. *Tracer Protection Service*, 328 NLRB 734 (1999). Where an employee is discharged for misconduct arising out of protected activities, the employer has the burden of showing that it held an honest belief that the employee engaged in serious misconduct. If the employer meets that burden, the General Counsel must then show affirmatively that the misconduct did not occur. *Pepsi-Cola Co.*, 330 NLRB 174 (2000); *Rubin Bros. Footwear, Inc.*, 99 NLRB 610 (1952). Clearly, threats of death or physical harm lay well outside the Act’s protection. *Precision Window Mfg.*, 963 F.2d 1105 (8th Cir. 1992).

Murphy’s credible representation that he called Hudson, then a union member, for the purpose of addressing erroneous strike rumors and Hudson’s decertification activity that afternoon establishes that the principal purpose of his call amounted to activity protected by Section 7 of the Act. The next question for resolution under *Burnup & Sims* is whether Respondent has shown that it held an honest belief that Murphy engaged in serious misconduct during the course of his discussion with Hudson. In my judgment, Respondent did not meet that burden. Instead, for reasons detailed below, I find that Respondent deliberately distorted Murphy’s remarks to Hudson in order to rid itself of a “passionate” and effective union steward disliked by management because he had become a formidable protagonist of the union cause.

First, the evidence strongly suggests that Respondent harbored an ulterior motive when it aligned itself with the claim by Hudson that he had been threatened. The overall setting reflects that contract negotiations had reached a critical stage that Hudson favored decertifying the Union and that Murphy undoubtedly would again be a “passionate” and effective spokesman on behalf of continued union representation. Because Murphy had risen to this challenge in the past to defeat the prior decertification effort, his elimination might serve to achieve a more successful outcome of any emerging decertifi-

⁷ At the hearing, the Respondent argued that the appropriate analytical framework for this case should be *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), and its progeny, rather than *Burnup & Sims*. I have assumed that Respondent abandoned that argument as its posthearing contains no such argument.

cation effort. Furthermore, Johnson's extreme boldness in openly denigrating of Murphy's performance as steward in front of the other employees within the past year or so provides a strong indication of the animus harbored by management toward Murphy from the outset of this matter. Furthermore, Johnson's cavalier dismissal of the complaint by union proponent O'Connor a short while later stands in stark contrast to the treatment he accorded Hudson's complaint.

Second, I find that the threat perception described here lacks credibility. Even Hudson conceded that he did not harbor any belief that Murphy would harm him directly. Instead, he perceived that Murphy would conspire with other union members (presumably the Local 44 employees at Montana Power) to injure him through an on-the-job "accident." Despite the highly speculative character of the potential conspiracy that Hudson allegedly feared, Respondent did nothing consistent with the perceived threat.⁸ In fact, it kept the entire matter in-house, sharing it only with its own, presumably trusted, security contractor. Although Respondent purportedly gave Hudson the rest of the week off, there is no hint of any precautions to protect Hudson the following week when he returned to work while Respondent processed Murphy's discharge, an event that presumably would produce incendiary results. Nothing indicates that Respondent attempted to coordinate Hudson's assignments with those of the feared Montana Power employees to minimize any potentially dangerous contacts. Nothing indicates Respondent warned any general contractor to be on the lookout for trouble erupting because of bad blood between Hudson and other Local 44 members at common situs projects. Nothing indicates that Respondent reported its conclusion that one of its employees had threatened to kill or seriously harm another employee to any local police authority. In sum, Respondent's overall conduct appears inconsistent with the danger it claimed to perceive.

Third, I find that Kashinski approached his investigation of this matter with a closed mind determined to conclude that Murphy's use of the "marked man" idiom could only refer to a threat of death or serious bodily harm. Thus, Kashinski discounted as incredible Murphy's denial that he had threatened Hudson and his explanation that he intended the "marked man" phrase to mean only that Hudson would be remembered as someone who had been disloyal to the Union at a critical time. At the same time, Kashinski acknowledged that Hudson himself had provided a virtually identical rendition of the substance of disputed conversation. This disregard for the explanation of the alleged perpetrator even in the face of substantial corroboration from the alleged victim impresses me as inexplicably irrational.

Fourth, Murphy had a 20-year stellar record as an employee of Respondent. Rather than according that record the objective weight it would appear to deserve and going from there, Respondent's case devolved into a strange, unsupported litany of innuendo. It included suggested inferences that Murphy, and

perhaps other Local 44 members if one accepts Hudson's conspiracy insights, conduct their affairs and resolve disputes in a manner akin to legendary organized crime characters. And regardless of the lessons Respondent may have learned from the terrible homicide of a Denver installer at the hands of a paramilitary character suffering from paranoid schizophrenia, or the threats against one of its officials by anti-Semitic hate groups, Respondent failed to show any reasonable relationship between those situations and the Murphy-Hudson tiff in Missoula.

But even assuming that the record supported the conclusion that Respondent held a good-faith belief that misconduct occurred, I have concluded, contrary to Respondent's assertion, that the General Counsel has shown that no misconduct occurred. Respondent seems to assume that if I find Murphy used the "marked man" idiom, then I must find that misconduct occurred. I disagree. In my judgment, the significance attached to Murphy's admitted use of that phrase must be consonant with the context in which it was used rather than some unreasonable, out-of-context meaning assigned to make it fit other objectives.

The "marked man" expression, which has its roots in the ancient practice of branding persons who claimed a recognized privilege to be tried for criminal conduct in an ecclesiastical court,⁹ carries a broader and more ambiguous meaning than Kashinski would lead one to believe. Although the practice of branding criminals has long since been abandoned in the English-speaking world, the expression has acquired a distinctive, if figurative, life of its own in modern times. For example, decisions by the Board and its administrative law judges frequently use the idiom usually to connote union supporters about to be discharged or discriminated against by their employers. See, e.g., *Avondale Industries*, 329 NLRB 1064, 1067 (1999); *Eby-Brown Co.*, 328 NLRB 496, 450 (1999); *New Orleans Cold Storage Co.*, 326 NLRB 1471, 1477 (1998); and *Electronic Data Systems Corp.*, 305 NLRB 219, 244 (1991). This usage hardly implies "hit" men or Mafia characters.

But by the same token, the Board and its administrative law judges have found the use of the phrase in certain contexts violates Section 8(a)(1) of the Act.¹⁰ Thus, in *Masiongale Electrical-Mechanical*, 331 NLRB 534 (2000), slip op. at 6, Judge Rosenstein concluded that a supervisor's statement to a striking employee seeking reinstatement that he was not allowed on the project and that "around here you are considered a marked man, everyone on the job has a hunting license and shotguns" violated Section 8(a)(1). In *Olympic Fruit & Produce Co.*, 261 NLRB 322, 323 (1982), the Board in a summary judgment proceeding where Respondent failed to file an answer that a statement by the company's general manager threatened employees in violation of the Act by telling them that a former

⁸ I find Hudson's purported fears for the safety of his stepchildren and his wife somewhat inconsistent with his belief that Murphy would influence others to cause an on-the-job "accident" rather than personally harm him.

⁹ BLACK'S LAW DICTIONARY, West Group (7th ed. 1999), at 151 and 1465, respectively, for the discussion of the "benefit of clergy" privilege and the letter "T" used to mark those who had claimed the privilege.

¹⁰ My research failed to locate any 8(b)(1)(A) case finding that a labor organization engaged in an unfair labor practice under the Act involving the use of the phrase by an agent in framing a threatening statement directed at an employee.

employee responsible for a union organizing effort was a “marked man” if seen by him. In *Commercial Controls Corp.*, 118 NLRB 1344, 1345 (1957), the Board held that the company violated Section 8(a)(1) when a department manager told an employee that he “would get out of this company, because it will get you if it takes 10 years . . . you’re a marked man.” In *Phelps Dodge Refining Corp.*, 38 NLRB 555, 564 (1942), the Board found unlawful a supervisor’s warning to an employee that “all these C.I.O. men working in this department are marked . . . you don’t want to be a marked man do you?” Finally in *Kansas Utilities Co.*, 35 NLRB 936, 941 (1941), the Board found unlawful a supervisor’s statement to an employee who had joined a union that he was “through. . . . From now on . . . you’re a marked man.” Apart perhaps from the statement in the *Masiongale* case, none of the above statements found unlawful imply a threat of physical harm or death.

Lexicographers commonly allude to the idiomatic expression “marked man” in connection with defining the adjective “marked.” A representative sample of the definitions confirms the ambiguous character of that phrase. Thus, WEBSTER’S UNABRIDGED DICTIONARY notes that the phrase can mean “a person on whom attention or interest is focused: enjoying fame or notoriety” but on the other hand it can mean a person who is “an object of attack, suspicion, or vengeance.”¹¹ THE RANDOM HOUSE UNABRIDGED DICTIONARY provides this example of the manner in which the adjective “marked” is used: “watched as an object of suspicion or vengeance: a marked man.”¹² An electronic version of THE AMERICAN HERITAGE® DICTIONARY OF THE ENGLISH LANGUAGE contains this definition of marked: “Singled out, especially for a dire fate: a marked man.”¹³ By contrast, *The Phrase Finder*, an online reference provided by the Sheffield Hallam University nearer to Murphy’s roots,¹⁴ defines “a marked man” in a manner that is at once more neutral and more specific. It labels a marked man as “[s]omeone singled out for attention or accused of a crime.”¹⁵

Here, Murphy used the “marked man” phrase while speaking to Hudson on February 8 about the nascent decertification movement at that critical time. I credit Murphy’s vastly more comprehensive and coherent account of the February 8 telephone conversation. In my judgment that account establishes that the core message amounts to nothing more than Murphy’s attempt to impress upon Hudson that his extremely disloyal conduct at such a critical time would leave him stigmatized in the eyes of the other employees forever. The fact that Murphy immediately and persistently denied Hudson’s repeated assertions that he had been threatened lends considerable credence to

the conclusion that, in fact, no threat occurred. Accordingly, I find that Murphy’s use of the “marked man” idiomatic expression in this context was not a threat of death or bodily harm as Respondent claims. Instead, I find that as used the phrase served only to warn Hudson that he risked the loathing of his fellow workers for his disloyalty. Such a warning does not constitute unprotected misconduct under the Act permitting the discharge of an employee. See, e.g., *Tawas Tube Products, Inc.*, 151 NLRB 46 (1965); *Auto Workers Local 248 (Allis-Chalmers Mfg. Co.)*, 149 NLRB 67 (1964).

As I am unable to conclude either that Respondent harbored a good-faith belief that Murphy engaged in misconduct, or that he in fact engaged in any misconduct during the disputed conversation with Hudson, I find Respondent violated Section 8(a)(1) as alleged by suspending and then terminating him.

CONCLUSIONS OF LAW

1. By suspending and then discharging Benny Murphy the Respondent engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) of the Act.

2. Respondent’s unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, my recommended Order will require that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Having discharged Benny Murphy for engaging in activities protected by Section 7 of the Act, Respondent must offer him immediate reinstatement and make him whole for any loss of earnings and other benefits. Backpay is to be computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Contributions required for any benefit trust account on Murphy’s behalf shall be in accord with *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

Further, Respondent must expunge from all of its records any reference to Murphy’s February 9 suspension as well as his February 16 discharge and notify him in writing that such action has been taken and that any evidence related to that termination will not be considered in any future personnel action affecting him. *Sterling Sugars, Inc.*, 261 NLRB 472 (1982). Finally, Respondent must post the attached notice to inform employees of their rights and the outcome of this matter.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁶

¹¹ WEBSTER’S THIRD INTERNATIONAL DICTIONARY, G&C Merriam Company (unabridged ed. 1963) at 1383.

¹² THE RANDOM HOUSE DICTIONARY OF THE ENGLISH LANGUAGE, Random House (unabridged ed. 1983) at 877.

¹³ THE AMERICAN HERITAGE® DICTIONARY OF THE ENGLISH LANGUAGE, Houghton Mifflin Company (4th ed. 2000).

¹⁴ The university is located in Sheffield, England. Murphy, who speaks with a very distinctive Irish accent, immigrated from “the north of Ireland.”

¹⁵ *The Phrase Finder*, Sheffield Hallam University, Sheffield, England.

¹⁶ If no exceptions are filed as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, TCI Cablevision of Montana, Inc., d/b/a AT&T Cable Services, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Suspending or discharging employees because they engage in activities protected by Section 7 of the Act.
 - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Within 14 days from the date of this Order, offer Benny Murphy full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.
 - (b) Make Benny Murphy whole for any loss of earnings and other benefits suffered as a result of his suspension and discharge in February 2000 in the manner set forth in the remedy section of the administrative law judge's decision in this case.
 - (c) Within 14 days from the date of this Order, remove from its files any reference to Benny Murphy's suspension and discharge in February 2000, and notify Murphy in writing that this has been done and that this suspension and discharge will not be used against him in any way.

(d) Within 14 days after service by the Region, post at its Missoula, Montana facility copies of the attached notice marked "Appendix."¹⁷ Copies of the notice, on forms provided by the Regional Director for Region 19, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 28, 2000.

(e) Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

¹⁷ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."